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## Power to the People? A Critique of the Florida Supreme Court's Interpretation of the Referendum Power in *Florida Land Company v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983)

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POWER TO THE PEOPLE? A CRITIQUE OF THE FLORIDA  
SUPREME COURT'S INTERPRETATION OF THE  
REFERENDUM POWER IN *Florida Land Company v. City of  
Winter Springs*, 427 So. 2d 170 (Fla. 1983).

PATRICIA LEARY\*

*It must not be; there is no power in Venice  
Can alter a decree established.  
'T will be recorded for a precedent,  
And many an error by the same example  
Will rush into the state. It cannot be.*<sup>1</sup>

**D**URING the Special Legislative Session of October 1987 the Florida Legislature voted to repeal the sales tax on services effective February 1, 1988.<sup>2</sup> The Legislature then voted to give the people of Florida the power to override its repeal of the services tax in a referendum to be held January 12, 1988.<sup>3</sup>

The Governor, however, vetoed this bill. In his veto message, he indicated that the referendum provision might be unconstitutional as "an improper abdication of legislative responsibility."<sup>4</sup> It is not clear whether the Governor believed the Legislature lacked the power to allow the people to make general law. He seemed more concerned that the people of Florida would be "affirmatively deceived"<sup>5</sup> by the referendum because the people would be asked to decide a complex tax issue by answering "yes" or "no" to a one-sentence question.<sup>6</sup> He called the bill "legally suspect,"<sup>7</sup> although

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1. W. SHAKESPEARE, *THE MERCHANT OF VENICE*, Act IV, Scene 1, lines 218-22.

2. Fla. CS for CS for SB 5B (1987) (2d Spec. Sess.) (Second Engrossed).

3. *Id.* § 62(2). Because the only difference between making a law and repealing the repeal of a law is one of semantics, this Article refers to any such attempt as making law by referendum.

4. Letter from Gov. Bob Martinez to Sen. Pres. John Vogt, Dem., Cocoa Beach (Oct. 13, 1987) (on file, *Florida State University Law Review*) [hereinafter Veto Message].

5. *Id.*

6. The ballot language does create the illusion that this is a mere popularity contest: "Do you favor the retention of the sales tax on services and the increase in the documentary stamp tax as adopted in 1987 and presently in effect, instead of increasing the general sales tax from 5 percent to 5.5 percent on goods, admissions, and rentals?" Fla. CS for CS for SB 5B, § 63(2) (1987) (2d Spec. Sess.) (Second Engrossed).

7. Veto Message, *supra* note 4, at 3.

it is uncertain whether he referred to the referendum provision, the ensuing deliberately planned budget deficit, or both.

This Article has two purposes: (1) to demonstrate that any attempt by the Legislature to allow the people to make law by referendum is unconstitutional, despite the language of the Florida Supreme Court in *Florida Land Co. v. City of Winter Springs*<sup>8</sup> to the contrary; and (2) to examine *Florida Land Co.* for what it says about the process of advocacy and decisionmaking. In this Article, the author neither addresses the desirability of amending the Florida Constitution to allow the people to make general law by referendum,<sup>9</sup> nor surveys the referendum movement in other states.<sup>10</sup>

## I. THE REFERENDUM POWER IN GENERAL

The notion that a legislative body should freely be able to return power to the people from whom it came has surface appeal. It is based, however, on the erroneous assumption that power is a gift that can be graciously accepted or declined or even returned if it fails to please the recipient. The Florida Constitution states, "the legislative power of the state shall be vested in a legislature of the state of Florida."<sup>11</sup>

The people have chosen for themselves a representative democracy.<sup>12</sup> If the Legislature decides that the people shall have direct democracy instead, it is doing by statute what can only be done by the constitution, that is, changing the fundamental structure of government.<sup>13</sup>

### A. *The United States Supreme Court Background*

The Guaranty Clause in article IV, section 4 of the United States Constitution provides that, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."<sup>14</sup> In 1912, the United States Supreme Court was asked

8. 427 So. 2d 170 (Fla. 1983).

9. See Daver & Havard, *The Florida Constitution of 1885—A Critique*, 8 U. FLA. L. REV. 1 (1955).

10. For a survey and discussion of the referendum movement, see Note, *Initiative and Referendum—Do they Encourage or Impair Better State Government?*, 5 FLA. ST. U.L. REV. 925 (1977); Note, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. CIN. L. REV. 541 (1984).

11. FLA. CONST. art. III, § 1.

12. See THE FEDERALIST NOS. 10 and 39 (J. Madison).

13. See 1968 FLA. ATT'Y GEN. BIENNIAL REP. 190, rendered February 7, 1968.

14. U.S. CONST. art IV, § 4.

to rule that the Guaranty Clause had been violated by a tax statute enacted pursuant to a provision of the Oregon Constitution reserving the referendum power to the people.<sup>16</sup> Labeling it a "political question," the Court refused to decide the issue.<sup>18</sup> Litigants learned to pitch their battles upon a different turf. In 1976, the United States Supreme Court decided *City of Eastlake v. Forest City Enterprises, Inc.*<sup>17</sup> In *City of Eastlake*, the challenge was to a provision permitting zoning changes by referendum contained in the city charter of Eastlake, Ohio. A landowner attacked the provision on due process grounds, asserting that it was an unconstitutional delegation of legislative power. The Court stated:

A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, *e.g.*, The Federalist No. 39 (v. Madison) [sic]. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.<sup>18</sup>

The Court observed that the people of Ohio, when they vested legislative power in the General Assembly, had expressly reserved to themselves the power to make law by referendum.<sup>19</sup> Another provision of the Ohio Constitution reserved the referendum power to the people of the state's municipalities.<sup>20</sup> The Court reasoned that since Ohians reserved the power to zone by referendum, the referendum could not be held invalid on federal constitutional grounds.

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15. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

16. *Id.* The question has been posed whether Congress could pass a law forbidding the use of lawmaking by referendum. See Note, *Constitutional Constraints on Initiative And Referendum*, 32 VAND. L. REV. 1143 (1979).

17. 426 U.S. 667 (1976).

18. *Id.* at 672.

19. "The legislative power of the state shall be vested in a general assembly . . . but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote . . . ." OHIO CONST. art. II, § 1.

20. "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . . ." OHIO CONST. art. II, sec. 1f.

### B. *The Florida Experience*

In 1968, the Attorney General of Florida, in an opinion for the legislative leadership, responded to the question of whether the Legislature could condition the effective date of taxation or appropriation legislation upon an affirmative vote of the people in a referendum.<sup>21</sup> In the Madisonian tradition, he stated that "the very nature of our representative government"<sup>22</sup> forbids such legislative buck-passing. He foresaw dire consequences if lawmaking becomes "a mere proposition submitted to the people to be adopted or rejected as they pleased." He cautioned:

If this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of law-givers, and with just wisdom enough to devise subtle schemes of imposture, to mislead the people. All the checks against improvident legislation will be swept away; and the character of the constitution will be radically changed.<sup>23</sup>

He further observed that "[t]he notion that the duty to maintain our government by the raising of revenues may be alienated by the legislature is not indicated by our constitution . . . ."<sup>24</sup>

A few months later, the citizens of Florida adopted a revised constitution.<sup>25</sup> In the document was a sentence not found in the constitution of 1885: "Special elections and referenda shall be held as provided by law."<sup>26</sup>

This sentence lay dormant, unnoticed and uninterpreted for almost fifteen years. Then, in March 1982, the Fifth District Court of Appeal, in a controversy involving local zoning by referendum, held that the above quoted sentence in article VI, section 5, combined with the truism in article I, section 1 that "[a]ll political power is inherent in the people," means that the people of Florida have reserved to themselves the power to make law by referen-

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21. 1968 FLA. ATT'Y GEN. BIENNIAL REP. 190, rendered February 7, 1968.

22. *Id.*

23. *Id.* at 191 (quoting *In re Opinions of the Justices* No. 36, 166 So. 706 (Ala. 1936) (quoting *Barto v. Himrod*, 8 N.Y. (4 Selden) 483, 59 Am. Dec. 506, 512-14 (N.Y. 1853)).

24. *Id.*

25. FLA. CONST. of 1968 (ratified by the electorate on November 5, 1968).

26. FLA. CONST. art. VI, § 5.

dum.<sup>27</sup> In reaching this conclusion the court relied upon the rationale of the Supreme Court in *Eastlake*.

The Florida Supreme Court was asked to resolve the conflict between the Fifth District Court of Appeal's decision in *Florida Land Co.* and an earlier decision of the First District Court of Appeal, *Andover Development Corp. v. City of New Smyrna Beach*.<sup>28</sup> *Andover* involved a referendum movement in New Smyrna Beach that was launched for the purpose of rezoning a specific parcel of land. A group of citizens seeking to block a Resort Residential Planned Unit Development (RR-PUD), for which a rezoning ordinance had already been passed, spearheaded a referendum movement that resulted in amending the city's charter to provide that zoning could be submitted to the citizens by referendum. The RR-PUD opponents obtained the required number of signatures, a referendum was held, and Andover's property was down-zoned. The First District Court held that as to Andover's tract the referendum was a violation of due process. Among the numerous authorities relied upon by the First District Court was the Ohio Supreme Court's opinion in *Eastlake*, prior to its reversal by the United States Supreme Court.

The Florida Supreme Court resolved the conflict in favor of the Fifth District Court of Appeal's decision in *Florida Land Co.*, accepting the district court's construction of article VI, section 5.<sup>29</sup> The supreme court's language virtually leaps off the page to answer the then unformulated question of whether the legislature may submit a tax law to the people for approval by referendum:

The citizens of the State of Florida in drafting and adopting the 1968 Constitution reserved certain powers to themselves, choosing to deal directly with some governmental measures. The referendum, then, is the essence of a reserve power. [citing *Eastlake*]. A reading of article 1, section 1 along with the words of article VI, section 5 of our state constitution, makes this abundantly clear [quoting the constitutional provisions].

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Once the referendum power is reserved, particularly as done in our current constitution, this power can be exercised wherever the

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27. *City of Winter Springs v. Florida Land Co.*, 413 So. 2d 84 (Fla. 5th DCA 1982) (quoting FLA. CONST. art. I, § 1), *aff'd*, 427 So. 2d 170 (Fla. 1983).

28. 328 So. 2d 231 (Fla. 1st DCA), *cert. denied*, 341 So. 2d 290 (Fla. 1976).

29. *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983).

people through their legislative bodies decide that it should be used.<sup>30</sup>

### III. THE *Florida Land Company* DECISION

*Florida Land Co.* is a study in advocacy and decisionmaking. In this section the author examines the soundness of the decision, the lesson that the case holds for the advocate, and options for solving the dilemma created by the decision.

#### A. A Critical Analysis of the *Florida Land Co. Decision*

When approaching *Florida Land Co.* as an exercise in the scrutiny of judicial decisionmaking, it is important to remember that the supreme court decided the case under its conflict jurisdiction.<sup>31</sup> The court accepted jurisdiction to resolve the conflict between the First District's decision in *Andover* and the Fifth District's decision in *Florida Land Co.*<sup>32</sup> The First District's decision rested in part on the Ohio Supreme Court's decision in *Eastlake* which was subsequently reversed by the United States Supreme Court.<sup>33</sup> The Fifth District's decision, however, relied upon the United States Supreme Court case which reversed the Ohio Supreme Court decision.<sup>34</sup> Thus, the First District's rationale was partially undermined by the reversal of *Eastlake*. Because the Florida Supreme Court in *Florida Land Co.* ignored the readily apparent differences between the Florida and Ohio Constitutions, it seems as though the court simply resolved the conflict by endorsing the view of the district court that had been on the winning side in the *Eastlake* struggle.

If this analysis seems too superficial to be convincing, so does the supreme court's unquestioning acceptance of *Eastlake's* applicability. It is as though the court saw *Eastlake* as an equation: state constitutional reservation of referendum power plus a municipal ordinance allowing zoning referenda equals the conclusion that zoning by referendum does not violate due process. The only thing keeping the *Eastlake* analysis from fitting like a glove was the dif-

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30. *Id.* at 172-73.

31. FLA. CONST. art. V, § 3(b)3.

32. *Florida Land Co.*, 427 So. 2d at 171.

33. *Andover Dev. Corp. v. City of New Smyrna Beach*, 328 So. 2d 231, 237 (Fla. 1st DCA), *cert. denied*, 341 So. 2d 290 (Fla. 1976).

34. *Florida Land Co.*, 413 So. 2d at 87.

ficulty in finding Florida analogues to the equation's components. The court used the "inherent power of the people" clause from article 1, section 1 to bootstrap article VI, section 5 into the constitutional reservation of power necessary to complete the *Eastlake* equation. However, the "inherent power" provision is simply a recognition that power belongs to the people, who may then do with it what they will. The people of Florida had already made a tripartite distribution of their inherent power, specifically vesting the legislative power in the state legislature.<sup>35</sup> Thus, if article VI, section 5 reserves power to the people, it must do so standing alone.

The court in *Florida Land Co.* observed that the 1885 constitution contained no general referendum provision, but that "[r]eferendum provisions in that constitution dealt with certain specific sections."<sup>36</sup> The point of the statement is not clear: Is the court saying that in the 1885 constitution the referendum provisions dealt only with specific sections? Or is the court saying that there are no referendum provisions in specific sections of the 1968 constitution?

The court does seem to imply both an absence of generality then, and corresponding absence of particularity now. There are, however, referendum provisions in specific sections of the 1968 constitution similar to those in the 1885 constitution.<sup>37</sup> Perhaps the real significance of the court's general provision/specific provision comparison in *Florida Land Co.* is that it reveals the court's true rationale for construing the crucial sentence in article VI, section 5 as a reservation of power: because it's there. The court never analyzes why that sentence is there as an end to determining what it means.

Not one word of commentary or legislative history supports the proposition that the sentence represents a reservation of referendum power in the people. In fact, the reference in article VI to referenda is of such little moment that the word "referendum" does not even appear in the commentary following article VI, section 5 in the annotated constitution. The commentator states, "This section deals with general and special elections."<sup>38</sup> When article VI was being crafted by the Suffrage and Elections Committee of the Revision Commission, a commentator wrote:

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35. 1968 FLA. ATT'Y. GEN. BIENNIAL REP. 190, rendered February 7, 1968.

36. *Florida Land Co.*, 427 So. 2d at 172.

37. See, e.g., FLA. CONST. art. III, § 10; FLA. CONST. art. VII, § 3.

38. FLA. CONST. art. VI, § 5 (commentary by Talbot D'Alemberte).



Another important consideration in constitutional revision regarding suffrage and elections is the grant of authority to the legislature over *election administration*. This grant appears in the present constitution in various places. Even in the article on suffrage and elections, bits and pieces of such authority are scattered throughout the article.<sup>39</sup>

Indeed, article VI contains five references to the concept that the legislature provide "by law" the regulatory specificity that would otherwise clutter the constitution.<sup>40</sup> No drafter of constitutional language seeking to make clear the extraordinary proposition that referendum power was reserved to the people would choose the expression "as provided by law" and then bury it in the suffrage and elections article, where it would be among four other similar provisions, all of which were intended to be given their ordinary meaning.

Article VI deals with procedure, not power. Section 1 provides for direct and secret vote, decisions by the plurality, and the regulation of elections by law.<sup>41</sup> Section 2 defines who may be an elector.<sup>42</sup> Section 3 contains the oath.<sup>43</sup> Section 4 disqualifies as electors convicted felons and those adjudicated mentally incompetent.<sup>44</sup> Section 5 specifies the date on which general elections will be held. Appended to this provision is the sentence, "Special elections and referenda shall be held as provided by law."<sup>45</sup> Finally, section 6 provides for the regulation by law of municipal elections.<sup>46</sup> In the crucial sentence of section 5, there is no mention of the people, power, or the reservation of power. It is extraordinary that the people of Florida would choose to reserve to

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39. Fla. Const. Rev. Comm., comments on first draft of the Committee on Suffrage and Elections, Elston E. Rody, Professor of Government, Florida State University (May 2, 1966) (emphasis supplied) (on file, *Florida State University Law Review*).

40. FLA. CONST. art. VI, §§ 1, 2, 5, and 6.

41. *Id.* § 1.

42. *Id.* § 2.

43. *Id.* § 3.

44. *Id.* § 4.

45. The text of section 5 is set out in full below:

GENERAL AND SPECIAL ELECTIONS. — A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. Special elections and referenda shall be held as provided by law.

FLA. CONST. art. VI, § 5.

46. FLA. CONST. art. VI, § 6.

themselves the power to make law by referendum without mention of the concepts of power or its reservation, and would do so in a section of the constitution dealing not with the distribution of power but with the regulation and administration of elections.<sup>47</sup>

When article VI left the Suffrage and Elections Committee of the Revision Commission, the last sentence of section 5 read: "Special elections and referenda shall be held at the time and in the manner provided by law."<sup>48</sup> The substitution of the language "as provided by law" first appeared in the June 14, 1966 draft of the Commission as a whole.<sup>49</sup> No minutes or editorial comments suggest who made the change, or why. One can only assume that it was done in the Style and Drafting Committee when all sections were received from the individual subject committees to be prepared for the next full commission session.<sup>50</sup> It is difficult to believe that a constitutional change as important as the reservation of referendum power in the people would be devoid of legislative history reflecting the debate upon the merits of such a controversial proposal.<sup>51</sup>

The Florida Supreme Court in *Florida Land Co.* cited a 1977 article in the *Florida State University Law Review* for its discussion of the groundswell of referendum movements since the turn of

47. In Ohio, for example, the reservation power is done virtually in the same breath as the grant of power to the legislature. "The legislative power of the state shall be vested in a general assembly . . . but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote. . . ." OHIO CONST. art. II, § 1.

48. FLA. CONST. art. VI, § 5, 1st, 2nd, and 3rd drafts by Suffrage and Elections Committee (1st draft dated May 2, 1966, no dates on 2nd & 3rd drafts).

49. Con. Rev. Comm., minutes of meeting (June 14, 1966) (first draft of commission proposal for use at public hearings)(copy on file, *Florida State University Law Review*).

50. One can imagine the dialogue over the change between two members of the Style and Drafting Committee:

A: "Let's change 'at the time and in the manner' to 'as.' It sounds better and means the same thing."

B: "But suppose someone thinks it means that the people are changing the distribution of power in the constitution and reserving to themselves the power to govern by referendum?"

Both together: "Naaaaa!"

51. Compare the history of Maryland's constitutional referendum provision. It was a response "to the public outcry over corruption in state government and alleged abuses of legislative power." *Kelly v. Marylanders for Sports Sanity, Inc.*, No. 75 (Md. Sept. 8, 1987)(Westlaw MD-CS) at 16 (quoting *Ritchmount Partnership v. Board*, 283 Md. 48, 60 nn.9-10, 388 A.2d 523 (1978)).

the century.<sup>52</sup> In that article, the author compared the constitutions of all twenty-one states then providing for some form of direct democracy; Florida is not among them. Curiously, it did not concern the court that, if the reservation of referendum power in the 1968 constitution is so explicit, Florida was missing from a purportedly exclusive list of states providing direct democracy as of 1977.

### B. The Advocacy Perspective

The briefs filed on behalf of Florida Land Company in the Florida Supreme Court in *Florida Land Co.* are textbook examples of good brief writing.<sup>53</sup> They are elegantly written, persuasive, organized, and internally consistent.<sup>54</sup> The advocates' strengths, however, were also their weaknesses: they fought their fight on too high a plane. The argument that the Fifth District Court of Appeal's construction of article VI, section 5 is completely unsupportable was stated as if it were obvious.<sup>55</sup> The lawyers did assert, quite forcefully, that *Eastlake* was inapplicable because of the differences in the Ohio and Florida Constitutions.<sup>56</sup> The main focus of the dissimilarity argument, however, was that Florida's Constitution does not contain a provision reserving the referendum power to municipalities.<sup>57</sup>

Unfortunately, the advocates succumbed to the temptation of sophistication. Key arguments in Florida Land Company's briefs were based on the assumption that article VI, section 5 is a reservation of power, but not one that applies to municipal zoning. Counsel themselves characterized the absence of statutory authority for zoning by referendum as more important than the absence of constitutional authority to do so.<sup>58</sup> They contended that, while "the State Legislature is empowered by the people to establish ref-

52. *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170, 172 n.5 (Fla. 1983) (citing Note, *Initiative and Referendum—Do They Encourage or Impair Better State Government?*, 5 FLA. ST. U.L. REV. 925 (1977)).

53. See generally Brief for Petitioner, *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983) (No. 62093) [hereinafter Brief for Petitioner].

54. This is not intended as a comment on the legal merits of Florida Land Company's arguments, which is beyond the scope of this Article.

55. Brief for Petitioner at 12.

56. *Id.* at 15.

57. *Id.*; Reply Brief of Petitioner at 5, *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983) (No. 62093) [hereinafter Reply Brief of Petitioner].

58. Brief of Petitioner at 12.

erenda where needed,"<sup>59</sup> the Legislature has not seen fit to do so for local zoning. In fact, chapter 163, Florida Statutes, which provides the procedure for zoning, makes no mention of referenda.<sup>60</sup> Therefore, so went the argument, the Legislature has by omission "*provided by law*" that zoning may not be accomplished by referendum.<sup>61</sup> Finally, the advocates present the *piece de resistance* of sophistication, an argument that turns upon the difference between legislative and administrative acts as applied to zoning.<sup>62</sup>

The willingness of Florida Land Company's counsel to accept article VI, section 5 as a reservation of power is an "even if" tactic that is one of the hallmarks of effective advocacy. It should be difficult to lose a case if an advocate can convince the court that *even if* the court decides a pivotal question against it, the result will be the same. In hindsight, the strategy appears to have backfired in *Florida Land Co.* If counsel for Florida Land Company could have convinced the court that article VI, section 5 is *not* a reservation of the referendum power, the result in the case might well have been different.<sup>63</sup> Instead, they unwittingly allowed the court to complete its *Eastlake* equation<sup>64</sup> with a clear conscience. It is as though the advocates, in trying to encircle the court with reasons to rule in their client's favor, drove the court to a simplistic and seemingly safe solution.

### C. *Dealing with the Florida Land Co. Precedent*

The court's interpretation of article VI, section 5 is *simplex dictum*, "a mere assertion; an assertion without proof."<sup>65</sup> But it is not dictum in the sense that would allow a court to ignore it. While in the jurisprudential sense, dictum is a gratuitous statement not essential to the determination of a case,<sup>66</sup> the court's assumption about article VI, section 5 is the heart and soul of the court's rationale.

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59. Reply Brief of Petitioner at 5-6.

60. Brief of Petitioner at 13, 17, & 19.

61. *Id.* at 13 (emphasis in original).

62. *Id.* at 23-27.

63. This is, of course, impossible to say with certainty. The court might have decided that the City of Winter Springs had the power to provide for local referenda even without such a reservation of power in the state constitution.

64. See text accompanying *supra* notes 34-35.

65. BLACK'S LAW DICTIONARY 409 (5th ed. 1979).

66. *Id.*

If a tax referendum question is put before it,<sup>67</sup> the Florida Supreme Court will thus face a question larger than the legal issues involved in that case: the question of how much importance to give to the linchpin rationale of a unanimous Florida Supreme Court opinion. It is a question at the heart of jurisprudential theory.

Courts facing such a quagmire can avoid it if the cases are distinguishable on their facts. Obviously, local rezoning by referendum is factually distinguishable from the legislature's attempt to submit a general law to the approval of the electorate through a statewide referendum. Equally obvious, however, is that unless the Florida Supreme Court abandons its rationale in *Florida Land Co.*, a referendum provision like the one found in Committee Substitute for Senate Bill SB would be found constitutional. This is because the language in *Florida Land Co.* supporting this conclusion is so broad that factual distinctions are meaningless. The court wrote unequivocally, "Once the referendum power is reserved, particularly as done in our current constitution, this power can be exercised wherever the people through their legislative bodies decide that it should be used."<sup>68</sup> It is conceivable that the court could say that by "legislative bodies," it meant local governments, in keeping with the facts of that case. The court is free to limit its own opinion in *Florida Land Co.*; however, such a limitation of article VI, section 5 would require an even greater distortion of the language of that section than has already taken place. It is difficult to envision the court saying convincingly that "as provided by law" in the constitution refers only to local governments, and not to the Florida Legislature, when neither the words themselves nor their context will support such a conclusion.<sup>69</sup>

To provide a principled rationale for a decision on a statewide tax referendum question, the court must repudiate its rationale in

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67. In a special legislative session held as this issue of the *Law Review* was going to press, the Florida Legislature passed and the Governor signed into law a repeal of the services tax. The bill contained no referendum provision.

68. *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170, 172-73 (Fla. 1983). Because the referendum power had been expressly reserved in the Ohio Constitution, the Supreme Court in *Eastlake* found that there was no unconstitutional delegation of legislative power. The Court's statement that "[a] referendum cannot, however, be characterized as a delegation of power," *Eastlake*, 426 U.S. at 672, must be read in that context. It should not be read as saying that a referendum cannot be a delegation of power even when, as in Florida, the referendum power is not expressly reserved. Nevertheless, a more appropriate nomenclature than "delegation of power" for the constitutional infirmity in such a situation might be "abdication of power" or "alienation of power."

69. Article VI is the grant of authority to the legislature over election administration. See generally *supra* note 39 and accompanying text.

*Florida Land Co.* The court's only option when language it wishes to repudiate is not dictum and when distinguishing the case on its facts is meaningless, is to overrule the unsound precedent.

A fact that makes this possibility more likely than it would otherwise be for so recent a decision is that the composition of the court has changed dramatically since 1983. Of the six justices deciding *Florida Land Co.*, only three remain on the court.<sup>70</sup> Even if these three justices adhere to their rationale in *Florida Land Co.*, the court has a new majority in the four justices most recently appointed.<sup>71</sup>

If *Florida Land Co.* is overruled, local government zoning by referendum will again be an unsettled issue. To reject *Florida Land Co.* is not necessarily to embrace *Andover*. The fact that the court's decision in *Florida Land Co.* is not supported by a valid premise does not preclude the possibility that there exists some other, more sound rationale for the same result. Unless the court were to specifically adopt the reasoning in *Andover* or provide a substitute rationale for the result in *Florida Land Co.* when it jettisoned the article VI, section 5 rationale, the question would again be open to the ordinances of cities and the arguments of their lawyers. The court would eventually be called upon to again resolve the issue.

### III. CONCLUSION

*Florida Land Co.* is a reminder of the kinds of judicial statements that can result when courts faced with complex decisions eschew sophisticated arguments in favor of simplistic solutions. These statements can wait for years like ticking time bombs ready to explode in a case where the stakes are much higher than those in the case in which the court made its seemingly innocuous assumption. The construction of article VI, section 5 in *Florida Land Co.* is such a statement. In the context of local zoning, the court's ill-considered acceptance of the *Eastlake* rationale seems harmless. The consequence, however, of applying unfortunate constitutional construction in *Florida Land Co.* to a statewide referendum context is that, because of an argument over a piece of land in Winter Springs, the people of Florida will be allowed to make general law on taxation, a power given to the legislature by the people and not

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70. Justices Adkins, Alderman, and Boyd have resigned from the court. Justices Ehrlich, McDonald, and Overton are still sitting.

71. Since 1983, Justices Barkett, Grimes, Kogan and Shaw have joined the court.

reserved to themselves. If asked to rule upon the constitutionality of a referendum on the services tax, the Florida Supreme Court should defuse *Florida Land Co.*'s power to lay waste to the system of government chosen by Florida's citizens.

The introduction to this Article refers to *Florida Land Co.*'s value for what it says about advocacy and decisionmaking. It is also important for what it will say to the future about the process of *stare decisis*. How a court deals with its own unfortunate precedent says much about the court itself.<sup>72</sup>

If not for the *Florida Land Co.* precedent, the answer to the meaning of article VI, section 5 would be easy. Ironically, because the court avoided the difficult question in *Florida Land Co.* and embraced an easy solution, a question which should have been easy will now be more difficult because *Florida Land Co.* itself is an obstacle to the correct decision. A further irony is that if the Florida Supreme Court does reach the correct decision in a statewide tax referendum case, the court will also inevitably have to redécide the issue it so easily put to rest in *Florida Land Co.* Viewed from this perspective, the lessons of *Florida Land Co.* make it seem more like a Kafka parable than a case in the Southern Reporter.

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72. Just as many believe that one can judge a society by how it treats its unfortunate citizens, perhaps one can judge judges by the candor and intellect with which they face their own unfortunate precedents.